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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
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9 Juan M Tolano,

10 Petitioner,

11 v.

12 David Shinn, et al.,

13 Respondents.
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No. CV-22-02050-PHX-DLR

**ORDER and
DENIAL OF CERTIFICATE OF
APPEALABILITY**

15 Before the Court is the Report and Recommendation (“R&R”) of Magistrate Judge
16 Deborah M. Fine (Doc. 17) regarding Petitioner’s *Pro Se* Amended Petition for Writ of
17 Habeas Corpus (“the Petition”) filed pursuant to 28 U.S.C. § 2254 (Doc. 6). The R&R
18 recommends that the Petition be denied and dismissed with prejudice and that a Certificate
19 of Appealability and leave to proceed *in forma pauperis* on appeal be denied.

20 The Magistrate Judge advised the parties that they had fourteen days from the date
21 of service of a copy of the R&R to file specific written objections with the Court. (Doc. 17
22 at 38.) Petitioner filed objections to the R&R on January 22, 2024, (Doc. 20) and
23 Respondents filed their Response to Objections on February 5, 2024. (Doc. 22.) The Court
24 has considered the Petition and Petitioner’s objections to the R&R and has reviewed the
25 R&R de novo. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1).

26 In Ground One, Petitioner asserts that he received disparate treatment under the
27 Equal Protection Clause due to prosecutorial misconduct and vindictive prosecution. In
28 Ground Two (a), Petitioner asserts that he received ineffective assistance of counsel

1 because none of his trial court counsel reviewed the entire discovery in his cases, and in
2 Ground Two (b), Petitioner argues that the superior court should have held an evidentiary
3 hearing regarding whether his trial court counsel had reviewed such discovery.

4 **I. Background**

5 Petitioner was charged in Maricopa County Superior Court in CR2014-006097-
6 001 (“2014 case”) with committing multiple assaults and in CR2016-00231-001 (“2016
7 case”) with drug offenses. In 2017, Petitioner entered into plea agreements in both
8 cases. Pursuant to the plea agreement, he pled guilty to aggravated assault in the 2014
9 case and pled guilty to possessing a dangerous drug in the 2016 case. Petitioner was
10 sentenced to a term of one year for each conviction, to be served concurrently with
11 each other, and to be served concurrently with a sentence in an unrelated case.

12 On December 12, 2023, the R&R issued, recommending a finding that Ground One
13 was waived, Ground Two (a) lacks merit, and Ground Two(b) was procedurally defaulted.

14 **II. Petitioner’s Objections**

15 Petitioner’s first objection goes to Ground One, his assertion that he received
16 disparate treatment under the Equal Protection Clause due to prosecutorial misconduct
17 and vindictive prosecution. The state court found that by pleading guilty, Petitioner waived
18 his Ground One claim. Petitioner argues that because his trial counsel failed to review the
19 entire discovery in the case, he was prevented from making an informed and intelligent
20 decision to enter the plea agreements and therefore should not be found to have waived his
21 Ground One claim.

22 This objection challenges the R&R’s assertion that Petitioner did not provide the
23 subject contents of the discovery as an exhibit. As the Court understands this objection,
24 Petitioner is arguing that in this matter the Court does not need all 1,700 pages of discovery
25 because had counsel looked at any portion of that discovery and had “discussions [with
26 Petitioner] regarding moving forward in trial and at minimum a pre-trial/plea agreement
27 evidentiary hearing” there might have been a different outcome. Petitioner argues in his
28 objection that “when the [R&R’s] reasoning states that petitioner does not provide the

1 challenged contents of the discovery that reasoning is incorrect.” (Doc. 20 at 3.)

2 However, the objection does not address the issues raised and the reasons given by
3 the R&R for its recommendation of finding of waiver. The objection fails to provide the
4 challenged contents of discovery, and it does not address the R&R’s findings that Petitioner
5 failed to explain which questions he would have asked his counsel about the discovery that
6 would have led him to proceed to trial instead of pleading guilty. He also fails to address
7 his in-court, on the record statements during the changes of plea. He also acknowledged in
8 his Petition that he knew the contents of the discovery that counsel allegedly did not review;
9 that he had time to discuss the discovery with counsel; and that counsel answered all of his
10 questions.

11 The R&R correctly determined that, as to Ground One, Petitioner has not
12 established that the state court’s finding—which held that Petitioner waived the claim
13 asserted in Ground One—was contrary to or an unreasonable application of clearly
14 established federal law. The R&R also correctly found that Petitioner has not established
15 that the state court decision was based on an unreasonable determination of the facts in
16 light of the evidence. The Court agrees with the R&R that Ground One was waived with
17 Petitioner’s knowing, voluntary, and intelligent guilty pleas. The objection to the R&R’s
18 recommendations pertaining to Ground One is overruled.

19 Petitioner’s second objection goes to the R&R’s findings with regard to Ground
20 Two. As to Ground Two(b), he disagrees with the R&R’s finding that this claim was not
21 raised in his petition for review with the court of appeals. Although Petitioner asserted in
22 his trial court PCR that he should have been granted an evidentiary hearing on his discovery
23 claim, he did not provide a federal legal theory on which his claim was based, and so
24 Petitioner did not fairly present his Ground Two(b) claim to the state courts. *Castillo v.*
25 *McFadden*, 399 F. 3d 993,999 (9th Cir. 2005).

26 Petitioner’s objection to the R&R’s findings and recommendations on Ground
27 Two(a) are not well described, but it appears he is simply re-urging the argument rejected
28 by the R&R that his counsel were ineffective because they failed to review all of the

1 discovery in the two cases. The Court reviews claims of ineffective assistance of counsel
2 under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under
3 *Strickland*, Petitioner must show: (1) counsel's performance was deficient, and (2)
4 counsel's deficient performance prejudiced the defense. 466 U.S. at 687. The Court has
5 discretion to review the two prongs of the *Strickland* test in any order and need not
6 address both prongs if Movant makes an insufficient showing in one. *See Strickland*, 466
7 U.S. at 697.

8 Petitioner's conclusory assertions after his convictions that he would have
9 proceeded to trial instead of entering his guilty pleas if any of his trial court counsel had
10 reviewed all discovery is insufficient to demonstrate a reasonable probability that he
11 would have chosen to proceed to trial. The Petition does not present the contents of the
12 alleged discovery that his trial court counsel did not review. It states that none of his
13 counsel reviewed discovery "which contains purported assailants 'abuse' over a perpetual
14 period of time and alleged victims and witnesses' misbehavior, lieing [sic] and the use
15 or threat of law enforcement against purported assailants when not getting their way or
16 something they want." His objection states that there are "over 1,700 documents of
17 discovery in where there is extensive evidence of alleged victims and witnesses having
18 been in very similar cases as this one . . ." (Doc. 20 at 2-3.), vaguely suggesting that a
19 discussion about discovery with trial court counsel would have raised questions as to the
20 truthfulness of the victims and witnesses.

21 Petitioner's objection does not show that the R&R should have found that he met
22 the *Strickland* standard for ineffective assistance of counsel. Neither *Strickland* prong is
23 met. Petitioner does not make specific assertions regarding the alleged untruthfulness of
24 victims and witnesses in his cases, nor does he demonstrate how additional discussions
25 with trial court counsel would have affected Petitioner's decision to plead guilty
26 instead of proceeding to trial. Importantly, while represented by trial court counsel
27 Stephen Crawford, Petitioner stated at his change of plea hearing in both cases that his
28 trial court counsel had answered all of Petitioner's questions, and Petitioner's guilty pleas

1 were supported by factual bases to which Petitioner agreed in open court.

2 The R&R correctly concluded that Petitioner has not shown that the state court's
3 adjudication of his ineffective assistance of counsel claim was contrary to or an
4 unreasonable application of clearly established federal law, or that the state court decision
5 was an unreasonable determination of the facts. Petitioner's objections to the R&R's
6 findings on Grounds Two (a) and Two (b) are overruled.

7 **IT IS ORDERED** that Petitioner's Objections to the R&R (Doc. 20) are
8 **OVERRULED**.

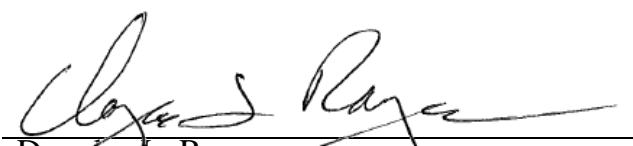
9 **IT IS ORDERED** that the R&R (Doc.17) is **ACCEPTED**.

10 **IT IS ORDERED** that Petitioner's Petition for Writ of Habeas Corpus filed
11 pursuant to 28 U.S.C. § 2254 (Doc. 6) is **DISMISSED** with prejudice.

12 **IT IS ORDERED** that a Certificate of Appealability and leave to proceed *in forma*
13 *pauperis* on appeal are **DENIED** because (i) the dismissal of the Petition is justified by a
14 plain procedural bar and jurists of reason would not find the procedural ruling debatable
15 and (ii) Petitioner has not made a substantial showing of the denial of a constitutional right.
16 The Clerk of the Court shall enter judgment denying and dismissing Petitioner's Petition
17 for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 6) with prejudice and
18 shall terminate this action.

19 Dated this 12th day of February, 2024.

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Douglas L. Rayes
United States District Judge